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FILE COPY

No. 368

In the Supreme Court of the United States

October Term, 1940

WELDON WARREN, ALIAS ROBERT WARREN,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 296–300) is reported at 113 F. (2d) 100.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1940 (R. 300). The petition for a writ of certiorari was filed August 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also

Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the courts below properly construed U. S. C. Title 22, Section 220, punishing the "use" of a passport secured by a false statement, to include the exhibition of a passport, as proof of citizenship, to an immigrant inspector by the holder of the passport upon his return to this country.[1]

2. Whether there was substantial evidence to prove a "use" of the passport.

3. (a) Whether the petitioner's conviction must fail if, as he contends, there was not sufficient competent evidence to establish the falsity of two of the four alleged false statements made in his passport application.

(b) Whether, if a review of the evidence as to these two alleged false statements is permissible, the Government sufficiently corroborated certain

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[1] This point was disposed of by the Circuit Court of Appeals upon the basis of its prior decision in *Browder v. United States*, 113 F. (2d) 97 (R. 297–298), in which a petition for a writ of certiorari is now pending in this Court (No. 287). Since the petitioner relies upon the arguments advanced in that petition and the supporting brief, the Government also depends upon its discussion of the point in its brief in reply to the petition. In that brief the Government contended that the point was correctly decided by the Circuit Court of Appeals and that it did not require review by this Court.

declarations of the petitioner tending to establish their falsity which were made before the application for the passport.

STATUTE INVOLVED

The pertinent portion of U. S. C., Title 22, Section 220 (Section 2 of Title IX of the Act of June 15, 1917, c. 30, 40 Stat. 227), is as follows:

> * * * whoever shall willfully and knowingly use or attempt to use * * * any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years or both.

STATEMENT

An indictment in one count was returned in the District Court for the Southern District of New York which charged that the petitioner violated U. S. C. Title 22, Section 220, by using a United States passport which he had secured by making certain false statements in the application therefor. It was alleged that the petitioner used this passport by presenting it to an immigrant inspector at the Port of New York for the purpose of securing entry upon his return from a trip abroad. The statements in the passport application which were charged to have been false were (1) that his name was Robert William Wiener; (2) that he was a citizen of the United States; (3) that he was born at Atlantic City, New Jersey, on September 5,

1896; and (4) that he had not resided outside the United States. (R. 4–5.)

Petitioner was convicted (R. 226) and sentenced to two years' imprisonment (R. 235). On appeal to the Circuit Court of Appeals for the Second Circuit the conviction was unanimously affirmed (R. 300).

The evidence is sufficiently summarized in the opinion of the Circuit Court of Appeals (R. 296–297).

ARGUMENT

I

Petitioner contends that there was not sufficient evidence to establish that he "used" the passport upon his return to this country. The testimony of the immigrant inspector on this point is contained at R. 52–58. This testimony, we submit, clearly supports the conclusions of the Circuit Court of Appeals (R. 298) that the immigrant inspector "testified repeatedly that the entry of the passport number on the [ship's] manifest enabled him to say with assurance that he had been shown the passport and had checked the information on the manifest as to residence and place of birth against information in the passport," and that the immigrant inspector's "testimony, if believed by the jury, made it plain that the passport issued to the appellant had been exhibited to him." Upon appeal the question is not, of course, whether the Government proved its case beyond a reasonable

doubt but simply whether there was any substantial evidence to warrant its submission to the jury.

II

Petitioner concedes that two of the four alleged false statements which were charged in the indictment to have been made in his application for a passport were established by sufficient competent evidence (Br. 17). He contends, however, that as to the remaining two alleged false statements, i. e., (1) that he was a citizen of the United States and (2) that he had never resided abroad, their falsity was not sufficiently proved because the Government relied solely upon certain uncorroborated prior declarations of the petitioner and because, if there was corroboration, it was inadequate. He further contends that he is entitled to a review of the evidence as to these two alleged false statements since in the trial court he questioned the sufficiency of the evidence as to each of the four alleged false statements and moved to have them withdrawn from the jury's consideration.

With reference to the petitioner's contention that it was not permissible to establish the falsity of the statements in the passport application by the petitioner's uncorroborated prior declarations, the Circuit Court of Appeals, after stating that the rule is that an accused may not be convicted on his uncorroborated confession, held, we think correctly, that this rule related only to uncorroborated con-

fessions or admissions after the event (R. 298). It conceded, however, that the uncorroborated confession rule had been pressed so far as to extend to the declarations of the accused made before the occurrence of the alleged crime in *Gordnier* v. *United States*, 261 Fed. 910, and *Duncan* v. *United States*, 68 F. (2d) 136, both decisions of the Circuit Court of Appeals for the Ninth Circuit (R. 299). A similar holding was made in *Gulotta* v. *United States* (unreported), decided by the Circuit Court of Appeals for the Eighth Circuit on July 24, 1940.[2] We do not believe it necessary for this Court to resolve this conflict in the present case since, for the following reasons, the resolution of the conflict would not entitle the petitioner to a reversal of his conviction:

(a) The petitioner conceded in the Circuit Court of Appeals and again concedes in this Court that the Government properly established the falsity of two of the four alleged false statements which he made in his passport application. He did not take that position in the trial court. He there contended that none of the four alleged false statements were sufficiently proved and therefore that all of them should be withdrawn from the jury's consideration (R. 198–205, 207). In addition, he acquiesced in a charge of the trial court, twice

[2] No reference is made in that decision to the decision of the Circuit Court of Appeals in the instant case rendered two weeks earlier.

given, that the jury might find the petitioner guilty if convinced that any one of the four statements in the passport application was false (R. 217, 224). If the petitioner had then taken the position which he now does and were fearful that the jury might base its verdict upon a statement the falsity of which was not established, he could have requested that only those statements be submitted to the jury which had properly been proved to be false. If this had been done and the trial court had nevertheless submitted all of the four alleged false statements to the jury, the petitioner would then have been in a position to urge the insufficiency of the evidence as to those statements which he deemed not proved to have been false. The petitioner should not be permitted to put the trial court in error because he now feels that the jury's consideration should have been restricted to two of the alleged false statements. Cf. *United States* v. *Mascuch,* 111 F. (2d) 602 (C. C. A. 2d), pending on petition for writ of certiorari No. 116, present Term; *United States* v. *Smith,* 112 F. (2d) 83, 86 (C. C. A. 2d).

Moreover, the petitioner could only have been prejudiced on the theory that the jury might conceivably have based its verdict upon one of the alleged false statements as to which, according to the petitioner, there was insufficient proof, rather than upon those as to which he admits there was adequate proof. No such presumption can be in-

dulged, particularly in view of the charge of the trial judge that the falsity of any statement on which the jury might base its verdict must be established beyond a reasonable doubt (R. 217–218). The jury is, of course, presumed to follow the court's instructions. A reversal may only result where prejudice is clearly shown (*Berger* v. *United States,* 295 U. S. 78). In the instant case there is no clear showing of prejudice. Petitioner has admitted that adequate proof establishing the falsity of at least two of the statements in the passport application was adduced. It is settled that in analogous cases under the perjury statute several assignments of perjury may be set forth in a single count and that conviction will be sustained if any one of such assignments is proved. *United States* v. *Mascuch, supra; United States* v. *Otto,* 54 F. (2d) 277, 279–280 (C. C. A. 2d); *Claiborne* v. *United States,* 77 F. (2d) 682, 687, 691–692 (C. C. A. 8th); *Clayton* v. *United States,* 284 Fed. 537, 539 (C. C. A. 4th); Wharton's *Criminal Law* (12th ed.), Vol. II, Sec. 1567.

(b) If, as petitioner contends, corroboration was necessary to support the declarations of the petitioner establishing the falsity of the statements made by him in his subsequent application for a passport, he admits, as we have stated, that the falsity of two of these statements was sufficiently proved. As to the petitioner's other two statements, i. e., that he was a citizen of the United

States and that he never resided abroad, we submit that there was ample corroborative proof. The so-called declarations of the petitioner, summarized in the opinion below (R. 297)[3] disclose that the petitioner had repeatedly stated prior to his application for a passport that he was a citizen or subject of Russia; that he was never in the United States before his arrival in 1914 and that his permanent residence before such arrival was in Russia. In addition to these declarations the Government introduced proof that the certified extract of the Atlantic City birth record (Exs. 10–11, R. 249–250; Exs. A, C, R. 273–275) which the petitioner had presented when applying for a passport in support of his claim of American citizenship, was based upon a forgery (R. 130–135), and that no certificate of birth of the petitioner had ever been filed in the State Bureau of Vital Statistics at Trenton, New Jersey, as required by law (R. 35–36). The Government also established that the petitioner had never applied for naturalization (R. 83). Clearly this evidence proved that the peti-

[3] These were the manifest of the ship on which the petitioner first arrived in this country in 1914 (if it be assumed that this manifest could be considered as a declaration of petitioner) (R. 98, Ex. 19, R. 261); the petitioner's declaration of arrival here at that time (R. 97); the petitioner's draft records, consisting of his registration card and questionnaire (R. 106, 107; Ex. 21, R. 264); and petitioner's application for a reentry permit in 1932 (R. 84; Ex. 13, R. 252; see also R. 86–89; Exs. 14, 16, R. 253, 255).

tioner's claim of birth in this country was false, that he had not acquired citizenship by naturalization, and that, being an alien, he must have resided abroad. This evidence consequently fully corroborates the statements as to his foreign citizenship and residence abroad which petitioner made in his pre-passport declarations.

In *Duncan* v. *United States, supra,* there was not, as here, proof that the defendant had never applied for citizenship, a point upon which that case turned.

Forte v. *United States,* 94 F. (2d) 236 (App. D. C.), is also not in point. That case merely held that a conviction could not be based upon a confession without corroboration of the entire *corpus delicti.* Not only was no confession involved here, but even if the falsity of the statements in the application for the passport may be deemed a part of the *corpus delicti,* the petitioner's prior declarations establishing falsity were, as we have shown, fully corroborated. In addition, the use of the passport, the gist of the offense, was proved by direct evidence and not by declarations or admissions.

CONCLUSION

This case does not require the resolving of any alleged conflict of decisions and there is presented no important question of Federal law. We there-

fore respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940